A. Filing a Claim

1. Attempts to Settle the Claim Directly - Requirement for Preliminary Written Demand to the Respondent

Until recently, most claims could not be filed in the arbitrazh courts until the plaintiff had made an attempt to settle the matter directly with the respondent, by means of a formal, written demand, accompanied by documents supporting the demand. As a general rule, the respondent was given thirty days in which to respond to the demand, and in some cases several months or more.[2] The plaintiff could file suit in the arbitrazh court either upon receiving a full or partial refusal of the demand, or if no answer was received by the end of the legally required period, and evidence of the attempt to settle the matter directly was a required part of a proper filing of suit, without which the filing would be rejected by the court. The 1995 APC eliminated the general requirement that this procedure be observed for all disputes. It does, however, allow for the possibility of its continuation in cases where the procedure is required by federal law or by the terms of a contract, and in such cases the court will require that documents showing that the procedure has been followed be submitted as a part of the petition of suit. While it is not clear how many enterprises include such provisions in their contracts as a matter of course,[3] there are a number of areas in which the procedure continues to be required by virtue of the applicable law.

One broad area of application is disputes concerning the conclusion, amendment, or abrogation of contracts which fall within the definition of "public contracts" under the terms of Article 445 of the Civil Code of the Russian Federation. As contracts for the provision of utilities services, such as water, heat, electricity, and telephone services fall within this definition, the majority of commercial enterprises of any size will have some contractual relationships for which these legal requirements apply. Other areas in which such procedures are required by the terms of legislation include disputes concerning communications and delivery contracts (e.g. postal package delivery)[4], disputes concerning rail transport, and others. It is important to note that in some instances the required demand must be sent to the respondent organization within a limited period of time after the claim has arisen, and if the demand is not sent within that time period the claimant may lose the right to make the demand and also the right to file suit at all. In such instances it may be dangerous for claimants to be over-accommodating in allowing informal attempts to resolve the dispute to continue too long. ***Even if discussion is***

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[2] Transport cases, for example, were subject to a three month response period on the preliminary demand. The plaintiff could file suit in less than three months only if the transport organization sent a specific rejection of the demand prior to that time.

[3] The inclusion of the preliminary claims procedure in contracts as a matter of general practice is recommended by some current Russian literature as a means to maintain an orderly process of identification and resolution of disputes with business partners. See, e.g., Anokhin, V.S., The Entrepreneur and the Arbitrazh Court [Predprinimatel i Arbitrazhnyi Sood] (Moscow: Liga Razum 1998) 49-55.

[4] See Article 38 of the Federal Law of the Russian Federation "On Communications," Sobranie Zakonodatel'stva RF, 1995, No. 8, Item 600.

continuing in an attempt to resolve the difference of opinion, it is important to remain aware of the restrictions in the governing legislation and to ensure that the required written demand is made in order to preserve the right to sue.

2. Form of Filing

A petition of suit is filed in writing, must be signed by the plaintiff(s) or the representative of the plaintiff(s), and must state a number of mandatory elements and include a number of mandatory appendices. Unlike the general courts, the arbitrazh courts do not "hold" a filing for a period in which the petitioner is permitted to cure any technical defects, counting the filing as made on the date of the original submission. ***Failure to include the required information or to attach the required appendices will result in the return of the filing by the court to the plaintiff as improper.*** The petitioner has the right to file the petition of suit again after correcting the omission(s) or errors. For purposes of periods of limitation, however, the suit will be considered to have been filed only on the date on which it was properly filed with all required appendices.

Because technical errors or omissions in the filing may have significant effects, it is important to be certain the required elements are present, particularly when time periods are an issue. If a deadline is missed, the arbitrazh court does have the power to reestablish or extend the limitation period according to the general principles for extending time limitations. It will, however, require that the period have been missed for a good reason, such as that the information required to complete the filing could not have been obtained by the petitioner before the deadline. A plaintiff to whom a petition of suit has been returned on the grounds of omission of required information or documents also has the right to appeal this decision. If the appeals instance finds that the filing should have been accepted, the suit will be considered to have been properly filed on the date of the original submission. The checklist provides a list of the information that must appear in the petition, and the documents that must be appended to it.

The arbitrazh courts treat the filing requirements extremely seriously and are quite formal in evaluating whether the requirements have been met. As many as 20-30% of all filings submitted are returned due to their failure to contain all required information and attachments or to a failure to present the required information and attachments in the required forms. Requirements as to form include the linguistic formulation of the nature of the claim and the type of relief requested. For example, a claim concerning an illegal act by a state body should state a request that the illegal act be "recognized as void" rather than that it be "repealed." Statements of claim of this type that contain the wrong language in describing the legal nature of the case (and the basis for arbitrazh court jurisdiction) and in stating the type of relief requested may be returned to the submitting party, on the grounds that the arbitrazh courts do not have the authority to "repeal" legal acts, only to hold them void.

Parties should be aware that the need for inclusion of all required information in an exact manner, precise expression of the claim and its legal bases, and the collection and authentication/notarization of quite a number of documents will significantly increase the

time required to prepare a filing, especially in comparison to systems (such as those of most states and the federal courts in the United States) in which only a relatively general statement of the claim is required in order to file. Preparation must usually be begun with some lead time prior to any filing deadline, or there will be a substantial risk that the filing won't be completed by the required date or may be returned without sufficient time to correct errors or omissions. This is particular true where foreign documents must be translated and must be authenticated or "legalized" through a consular office or other means. The formality of the filing requirements and the time required to meet them also has an effect on the costs associated with preparing a filing.

In preparing a claim for filing, it is appropriate to keep in mind that the arbitrazh courts have a broad jurisdiction. Although some courts may divide cases among judges along broad categorizations, the judges have a general competence and cannot be specialists in the details of legal regulation in every area of law that may be the subject of a petition of suit, nor in the practices and economic issues involved in every type of entrepreneurial activity. In expressing the grounds for the claim, petitioners should not assume a detailed knowledge on the part of the judge, and should ensure that they provide all of the information and explanation needed to make the entire factual situation and all of the reasoning behind the legal arguments clear to the judge. Attachments for the filing should include copies of the laws and regulations upon which the claim is based, and others if they are relevant to the proper resolution of the claim. While this is particularly necessary in regard to provisions that may be difficult for the court to locate on its own (such as instructional letters or procedural rules issued by various state bodies), it is helpful to the court and prudent on the part of the petitioner to ensure that accurate copies of all of the relevant materials are immediately to hand at the time that the court reviews the petition.

CHECKLIST
Information that Must Appear in the Petition of Suit:

- ❑ the name of the arbitrazh court to which the petition of suit is being submitted;
- ❑ the names of the persons involved in the case and their mailing addresses;
- ❑ the value of the suit, if the suit is, by its nature, subject to valuation;
- ❑ a description of the circumstances on which the claims made in the suit are based;
- ❑ a description of the evidence confirming the bases for the claims;
- ❑ a statement of the amount subject to recovery or which is being contested;
- ❑ a statement of the demands of the plaintiff, including reference to the laws or regulatory acts which are applicable. If several respondents are named, the demands with respect to each of them must be stated;
- ❑ information concerning compliance with requirements for pretrial attempts to settle the dispute, if such requirements are imposed by law or by the relevant contract;
- ❑ a list of the documents appended to the petition.

Documents that Must be Appended to a Petition of Suit:

- ❑ evidence of the payment of the required filing fee (a receipt);
- ❑ evidence of the sending of copies of the petition of suit to the respondent(s), along with copies of documents appended to it which they do not have (a receipt for registered delivery or a document indicating hand delivery);
- ❑ evidence of compliance with the pretrial procedures for resolution, if such are required by law or by contract (copies of the demand and attachments sent, a receipt for delivery, and a copy of the refusal of the demand, if one was received);
- ❑ evidence that an attempt was made to obtain payment by presenting the proper documents to the bank where the defendant maintains its accounts, if this procedure is envisioned by the applicable law;
- ❑ evidence of the circumstances and bases for the claim that are described in the petition (contracts, correspondence, etc.);
- ❑ power of attorney of the representative of the plaintiff, if the petition is signed by the representative rather than the plaintiff.

Other documents in addition to those specifically required by the procedural code (those included in the checklist) may also be needed, and can be appended to the filing. For example, in order to confirm that a petitioner is a duly registered legal entity, and to determine who has the power to represent the entity in court or authorize another person as representative, excerpts from the register of legal entities and copies of the founding documents, both duly authenticated, may be required. Other documents may be required in relation to particular claims or types of evidence.

An example of a petition of suit appears as Appendix A to the Handbook.

3. Combination of Several Claims in a Single Filing

Several related claims against the same respondent(s) may be joined into a single petition of suit. If unrelated claims are joined in a petition, however, this may serve as grounds for the return of the petition to the plaintiff for correction, as described above. The court also has the right on its own initiative to join a number of related claims into a single suit or to separate claims that are not sufficiently related into several independent proceedings.

4. Process for Review and Acceptance of a Petition

When a petition has been submitted, it is reviewed by a judge, who decides whether the petition is to be accepted for proceedings. If the petition complies with the requirements stated in the APC, the judge has no discretion, and must accept it for proceedings. If the petition or its appendices are incomplete or unrelated claims are joined, the judge will return the petition to the plaintiff, as discussed above. The petition will also be returned if it has been filed in the incorrect court (with respect to jurisdiction and venue), if an unauthorized person has signed the petition, or if the plaintiff has requested to withdraw the petition. In all of these cases of return, the plaintiff may refile the petition after correcting the relevant problem. The judge may also refuse to accept the petition on the grounds that the dispute is not subject to the jurisdiction of the arbitrazh courts or that a suit on the same grounds between the same parties is currently in progress or has previously been resolved by a decision of a court or arbitration tribunal or by a confirmed settlement agreement. A determination on the refusal of a case must be issued no more than five days after its receipt and may be appealed. An example of a determination accepting a case for proceedings and appointing a date for its consideration in court appears as Appendix B to the Handbook.

Additions or amendments may be made to the claims of the suit after its acceptance by means of the submission of a motion to that effect. The motion must be in written form and have as attachments any documents necessary to support the addition or amendment to the claim. If the change in creases the value of the suit, an additional payment of the filing fee may be required. An example of a motion to amend the claims of a suit appears as Appendix C to the Handbook.

5. Where to File - Jurisdiction and Venue

a) At What Court Level to File - Jurisdiction Within the Arbitrazh Courts

Cases filed in the arbitrazh courts must be within the jurisdiction of the arbitrazh courts, as discussed in Chapter 2. The petition will be filed in the first instance arbitrazh court for the appropriate subject of the Russian Federation — the arbitrazh court of the

republic, oblast (region), krai (territory), and so forth. The circuit arbitrazh courts have no first instance jurisdiction and cannot accept initial petitions of suit. The Higher Arbitrazh Court does have a limited first instance jurisdiction, but most of the disputes that fall within it are those occurring between high level bodies of state power. There is one category of dispute within the first instance jurisdiction of the Higher Arbitrazh Court that could possibly involve a private commercial party — disputes concerning the recognition of non-normative acts of the President of the Russian Federation, the State Duma or Council of the Federation, or the Government of the Russian Federation as void, on the grounds that they are inconsistent with higher law. Most of the acts issued by these bodies that affect any particular business are of a normative (rule creating) nature, and are therefore not subject to the jurisdiction of the arbitrazh courts except by direct legislative assignment. However, acts of the listed bodies are sometimes issued solely in relation to particular enterprises or business issues, such as and act concerning the privatization of a particular enterprise or the extension of credit to a particular company. A petition concerning recognition of such an act as void would have to be filed with the Higher Arbitrazh Court in the first instance.

b) In which Location to File - General Rules of Venue

As a general rule, petitions of suit should be filed in the arbitrazh court in the subject of the Federation where the respondent is located. If the respondent is a legal entity, the place of location is either the place of its state registration (the default rule) or another location specified in the founding documents for the legal entity.[5]

If the suit concerns the actions of a separate subdivision of a legal entity, the proper venue is the location of the separate subdivision. In this usage, a separate subdivision does not refer to functional, internal departments of a larger legal entity (e.g. an accounting department, or a “production subdivision” within a large factory), but rather to a subdivision that conducts separate economic and financial activities, often having its own identified property and accounts and being physically separate from the other activities of the legal entity. Examples of this type of subdivision are often factories or other facilities located some distance from the head offices or other operations of the company (e.g. an Ekaterinburg factory which is a subdivision of a legal entity whose main offices and operations are located in Moscow). Because the separate subdivision is not a legal entity in its own right, the place of its location is not determined by its place of registration or founding documents, but rather by its place of activity or physical location. The entity named in the suit, however, is the legal entity, since the separate subdivision has no legal personality. If it does have legal personality — i.e. if it is a subsidiary or an affiliated company that is legally organized as a separate entity — then it can sue and be sued in its own right and the rules for separate subdivisions do not apply.

[5] Article 54 of the Civil Code defines the place of location of a legal entity as the place of its state registration, but allows an entity to define another place of location in its founding documents if it so chooses.

c) Choice of Venue by the Petitioner or by Agreement

In a number of circumstances, the plaintiff may have a choice of several locations in which to file. If the suit concerns several respondents located in several subjects of the Russian Federation, the plaintiff may choose the location of any one of the respondents in which to file the suit against all. If the suit concerns a respondent whose place of location is unknown, the suit may be brought in the last known location of the respondent or in the location of the property of the respondent. If the suit concerns a respondent that is a citizen or organization of the Russian Federation who/which is located on the territory of another country, the plaintiff may file the suit at the location of the property of the respondent, or at the place of location of the plaintiff. Finally, if the suit derives from a contract in which a place of execution is stated, the plaintiff may choose to file suit at the location of execution of the contract, rather than in the location of the respondent. A different venue for consideration of suits may also be determined by contract between the parties.

d) Special Rules for Particular Cases

For some types of cases a specific venue other than that of the respondent has been established by law.[6] Cases concerning rights in immovables (buildings, land, improvements) must be filed in the arbitrazh court at the location of the property. Cases concerning contracts for transport must be filed at the location of the transportation organization. Cases concerning the validity of acts of state bodies of subjects of the Federation or bodies of local self-government must be filed in the arbitrazh court in the relevant subject of the Federation, regardless of where the body itself is located. Cases concerning the establishment of facts having legal significance may be filed at the place of the location of the petitioner, unless they concern immovables, in which case they must be filed in the location of the immovable property. Cases concerning bankruptcy are to be heard in the location of the debtor (which is consistent with the general rule, if the debtor is equated with the respondent). Certain cases concerning damages arising as a result of procedural actions in a court case must be heard by the arbitrazh court which considered the original case.[7]

e) Result of Filing in Improper Venue; Changes of Circumstance

The result of failure to file in the proper venue, if discovered at the time of filing, is the return of the petition to the plaintiff. If the improper venue becomes clear at a later stage in the consideration of the case, the arbitrazh court is obligated to transfer the case for the consideration of the proper court.[8] If, however, the case was accepted in accord with the rules for venue at the time the petition was filed, and a change in circumstances

[6] See Articles 27 and 29 of the APC.

[7] This category includes damages resulting from the imposition of arrest on property or funds as security for a suit, and damages resulting from the failure of a respondent or other persons to abide by prohibitions on their actions imposed by an arbitrazh court as a measure of security for the suit. See Articles 76 and 80 of the APC, and the discussion of measures of security for the suit later in this Chapter.

[8] See Article 31 of the APC.

occurs during its consideration (e.g. a change in the legal location of the respondent) which would result in a differing venue, the arbitrazh court is obligated to continue the consideration of the case on its merits. An arbitrazh court may transfer a case outside the venue determined by the general rules if, as a result of the recusal[9] of one or more judges or due to other factors, it is not possible for the case to be considered in the court in which it was filed. In these instances, the case is to be transferred to another court of the same level for consideration. In instances in which an arbitrazh court transfers a case for the consideration of another court, the receiving court cannot refuse to accept the case.

f) Rules Concerning Foreign Parties

It should be noted that specific venue rules are not provided in the law for cases including foreign persons and entities. Some of the rules which determine a case is subject to the jurisdiction of the arbitrazh courts (discussed above in Section A.4 of Chapter 2) also effect venue for a specific case. For example, the rule that cases concerning contracts for transport are heard at the place of location of the transportation agency defines both jurisdiction within the Russian arbitrazh courts (depending upon whether the agency is located in the Russian Federation) and venue within the arbitrazh courts (at the place of the agency's location). The same applies to the rule requiring consideration of a case concerning immovable property at the place of location of the property.

6. Periods of Limitation

There is no period of limitation established by the APC for the filing of claims in the arbitrazh courts***. Periods of limitation concerning particular claims are established by the substantive law applicable to the claim, rather than by the courts' procedural rules, and they may vary widely for different types of claims.*** A general period of three years limitation on civil-law claims is established by Article 196 of the Civil Code of the Russian Federation, but both longer and shorter periods may be established by law, and the Civil Code itself contains a number of differing periods for particular types of claims.[10] Article 371 of the Customs Code, for example, establishes a ten day period for the appeal of actions of the customs authorities. A period of limitation is not required to be established, and there are some claims for which no period of limitation at all applies, including those of a depositor against a bank for the return of a deposit and tort claims for damage to the life or health of individuals.[11] The general rules for calculation of

[9] Judge are "recused" when they cannot hear a particular case because they have a reason for bias or interest in the outcome of the case or because they have been involved in the case previously or for other reasons defined in the procedural legislation. Section C.7. of this chapter discusses the legal grounds for recusal of judges.

[10] An example of special periods of limitation is Article 181 of the Civil Code of the Russian Federation, which establishes a ten year period for suits demanding that the court recognize as void a transaction that is by its nature void ab initio, and a one year period after the cessation of threat or other grounds for voidability or after the plaintiff knew or should have known of grounds for voidability for suits concerning recognition of a voidable transaction as void.

[11] See Article 208 of the Civil Code. An unlimited right to sue may also be established for other claims by law.

limitations periods and for their suspension and renewal are contained in Articles 199-207 of the Civil Code, and apply equally to the general period and to special periods established by law. A period of limitations that has expired can be renewed by the court, if it considers the reasons for missing the required deadline to be adequate to justify this.

The expiration of a period of limitation is an affirmative defense, which must be raised by the respondent in order to be applied. The court will not independently determine whether the limitations period has expired when deciding whether to accept a claim for proceedings, and it will not raise the issue on its own initiative during the consideration of the case. The respondent may raise the issue by reference to the period of limitations in its initial refusal of the demands of the plaintiff, in its written response to the petition, or in its oral presentation to the court during the hearing of the case. If the limitation period has, in fact, expired, this will serve as grounds for the court to issue a decision rejecting the plaintiff's claim. However, if the respondent does not raise the limitations period prior to the issuance of the final decision in the court of first instance, it may not be raised on appeal as grounds for reversal of the decision.